



Construction & Engineering

OGP UPDATE ON MANAGING INFLATION

Further to the Office of Government Procurement's publication of measures to manage inflation risk in Public Works Contracts (which we described last month), the OGP has published [Inflation Calculation Workbooks](#) for Short Public Works Contracts. The entire suite of documents is now available on [this page](#).

ADJUDICATION: COLLATERAL WARRANTIES

There is precedent in the UK for a collateral warranty to be deemed to be a construction contract as defined in the legislation providing for adjudication, which means a dispute arising from a collateral warranty may be capable of being referred for adjudication. This is relevant because the definition of construction contract is similar in the Construction Contracts Act 2013 which provides for adjudication in Ireland (although the legislation differs in other ways; for example, the entitlement in Ireland is to refer a *payment* dispute (as opposed to a dispute)).

However, last year we [reported](#) on the case of [Toppan Holdings Ltd v Abbey Healthcare \(Mill Hill\) Ltd and Simply Construct \(UK\) LLP](#), in which the High Court in England & Wales dismissed an application to enforce an adjudicator's decision on the basis that the dispute arose from a collateral warranty which, in the circumstances of the case, the Court did not consider to be a construction contract.

Toppan was appealed and the England & Wales Court of Appeal has now granted the appeal in this [judgment](#). This potentially increases the likelihood of being able to refer a payment dispute arising under a collateral warranty for adjudication. A more detailed briefing will be available shortly.

HEALTH & SAFETY

Engineers Ireland (Electricity Engineering Committee) established a working group in late 2019 in light of increasing numbers of organisations & individuals working with electricity and, in particular, High Voltage (HV) electricity. They have now produced a [report](#) which sets out background information on legislation, regulations, and standards; looks at gaps/risks; and suggests actions.

SUSTAINABILITY

Decarbonising Construction || The World Green Building Council published a Whole Life Carbon Roadmap for buildings which aims to provide a detailed plan on how EU policy makers and the built environment sector can work together to decarbonise buildings and construction by 2050. The road map is available [here](#) and also discussed on the site of the Irish Green Building Council [here](#).



Funding || The EPA announced €650,000 to help businesses develop circular solutions in product and service design, production and distribution, use of resources including raw materials, and water, energy, and waste reduction. The fund is aimed at business-ready innovative projects targeting areas including construction/buildings. The deadline for submissions is **19 July 2022**. Details of ongoing projects are [here](#).

Local Councils || The EU set up a project to establish a [network of local councillors](#) willing to communicate EU initiatives and measures. This could be a potential forum for communicating what transition to carbon-neutral economies will require in terms of infrastructure and buildings.

Bauhaus Initiative || There is a [National Policy on Architecture](#) which was [presented](#) at the European Bauhaus Festival.

Value Toolkit || In the UK, the Construction Innovation Hub launched a Value Toolkit which is designed to help embed value-based decision making in the built environment sector. It aims to support procurement decisions that consider, in addition to cost and time, environmental, social and economic outcomes. The Toolkit requires registration and is available from [here](#). The Construction Innovation Hub is a consortium between the Building Research Establishment, the Manufacturing Technology Centre and the Centre for Digital Built Britain. The Toolkit is described as being supported by the Construction Leadership Council and UK Government.

Energy & Climate



REPowerEU & FIT FOR 55: UPDATE

REPowerEU || Last month we noted the Commission's REPowerEU proposals, aimed at speeding up the energy transition and reducing dependence on Russian fossil fuels. We look in more detail at what the proposals would mean for project delivery in our briefing [here](#).

We also draw attention in the same [briefing](#) to the time in which the permit-granting process is required to be carried out under the current Renewable Energy Directive, part of the Clean Energy Package. Though significant tranches of the Clean Energy Package have been transposed in Irish law, we have not seen that Article 16 (on permitting processes) of the Renewable Energy Directive has as yet been transposed. In this context we note that the Commission is beginning to take steps to address failure by certain Member States (including Ireland) to adequately transpose the Renewable Energy Directive, the Internal Market in Electricity Directive and the Energy Performance of Buildings Directive (announced [here](#)).

Fit for 55 || In terms of how soon the Fit for 55 proposals are likely to be brought into law, we look at progress [here](#). Many of the Council's negotiating positions have been finalised. Negotiations on final agreed texts are expected in Autumn and it is thought the new legislation will be brought into force fairly swiftly.

There have been other European Green Deal developments as well. The revised [TEN-E Regulation](#) 2022/869 setting out guidelines for trans-European energy infrastructure has been made. The Council also adopted a [recommendation](#) on ensuring fair transition. In terms of gas reform, ACER and CEER have published their [reaction](#) to the hydrogen and decarbonised gas packages.

Market Interventions || Published along with the REPowerEU proposals was the [Communication](#) on acceptable short-term emergency measures and long-term improvements in the gas and electricity sectors. Market interventions can be complex. For

example, suggested short-term measures include financial support for customers being diverted from congestion revenues or from infra-marginal rent from baseload generation. Some reflections on this are:

- as regards congestion revenues, this appears to contemplate use of interconnector revenues for purposes outside those envisaged under Article 19 of the Internal Market in Electricity [Regulation](#), including possibly ameliorating the effects of higher energy prices for consumers; and
- as regards inframarginal rent, conventional generators may be paying high prices for fuel or, conversely, may have adequately hedged against high fuel prices, in which case they ultimately have the option of selling the hedge in the event of a tax on inframarginal rent.

Suggested long-term improvements will require further development and consideration in the context of both the ACER [Final Assessment](#) and the significant market reform already underway pursuant to the Clean Energy Package.

Security of Supply || We also note that the [proposal](#) for a Regulation on measures to safeguard the security of gas has been [agreed](#) by the EU institutions. It sets gas storage filling requirements of 80% this year and 90% for subsequent years (although there is a derogation for Ireland). The Commission has also [recommended](#) that Member States raise oil stocks.

EU

Sanctions || The [fifth package](#) of sanctions banned coal imports from Russia. The [sixth package](#) banned seaborne crude oil imports and petroleum products (90% of oil imports), subject to transition periods.

Hydrogen || Member States have notified the Commission of [Important Projects of Common Interest](#) in the field of hydrogen. They comprise 41 projects in 15 Member States involved in development and manufacture of electrolyzers; fuel cells; technologies to power heavy-duty vehicles; and storage. A second tranche is anticipated in September.

Renewable Energy || A draft [Implementing Regulation](#) has been published setting out guidance on the evidence required for demonstrating compliance with the sustainability criteria for forest biomass laid down in Article 29 of Renewable Energy Directive.

Emissions || A Commission [Implementing Decision](#) updates the questionnaire for Member State reporting on application of the EU ETS. || A further Commission [Implementing Decision](#) sets out rules to verify sustainability and GHG emissions saving criteria and low indirect land-use change-risk criteria. || The Commission launched the [Alliance for Zero Emission Aviation](#) with the aim of preparing aviation for the entry into service of hydrogen and electric-powered aircraft, further described [here](#).

Heating & Cooling || The Commission published [four studies](#) that consider various aspects of the decarbonisation of heating and cooling in the EU, with the aim of addressing knowledge gaps to support the implementation of EU law.

Islands || The Parliament published a [resolution](#) on EU islands and cohesion policy: current situation and future challenges. While this concerns small islands it also refers to three EU Member States being islands so may also address Ireland. It calls for measures in relation to energy transition (para. 27-35) including specific rules and financial support which would recognise that proportionally very high levels of investment are needed to manage intermittent renewable energies.

Sustainable Energy Week || European Sustainable Energy Week takes place 26-30 September 2022. Further information is available [here](#).

Energy consumption || Eurostat published [information](#) on energy use in households for 2020. Main use is for heating (62.8% of final energy consumption). || The EEA [reported](#) that GHG emissions from cars and heavy goods vehicles increased over the period 2000-2019 despite better engine efficiency and use of biofuels.



INTERNAL MARKETS

Demand Response || ACER has begun drafting non-binding framework guidelines setting out objective principles for development of a [network code on demand response](#). ACER is [inviting views](#) on draft framework guidelines up to **2 August 2022**.

PCIs || ACER has [reported](#) on the progress of energy PCIs in 2021. 30% of projects encountered delays, usually to do with permit granting.

Interconnection || ACER [reported](#) that Member States have not significantly improved the interconnection capacity available for trading electricity with neighbouring Member States, and that they need to do more to reach the EU's 2020 target of 70% minimum interconnector capacity margin available for cross-zonal electricity trading.

Forward Market || ACER and CEER are [consulting](#) on the EU electricity forward market. || **Closing date: 29 July 2022**.

PICASSO || This [balancing platform](#) went live in central Europe, allowing cross-border exchanges of balancing energy from frequency restoration services with automatic activation.

LNG || The CEER has [reported](#) on LNG small-scale services in the EU.

INVESTMENT

Corporate Reporting || The EU institutions reached agreement on the proposed Corporate Sustainability Reporting Directive, as we reported [here](#).

EU Green Bond Standard || The negotiating positions of the EU institutions have been published and the Parliament's ECON Committee has published its report, further details of which are summarised in our briefing [here](#). The Parliament's proposal is that, two years after the Standard comes into force, the Commission

publishes an impact assessment on whether it should be mandatory.

Bonds || The Commission raised a further €5 billion in NextGenerationEU [green bonds](#). They were over six times over-subscribed.

CEF || The Commission launched a new [call for proposals](#) for cross-border EU energy infrastructure projects under the Connecting Europe Facility. It is open to the fifth Union list of PCIs. || **Closing date: 1 September 2022**.

EU Budget || The Commission published details of EU Budget expenditure in 2021. €146 billion (34.6% of the combined EU budget and NextGenerationEU) was spent on tackling climate change in 2021. Two-thirds of the level of expenditure in the period 2014-2020 was spent in 2021 alone. The 2023 [budget](#) was also published.

EIB || The Commission & EIB launched two [model financial instruments](#) to support REPowerEU and the European Bauhaus initiative. They give options on combining grants and loans and are aimed at supporting energy efficiency.

Regional Support || The [EU Mission for Adaptation to Climate Change](#) is a forum aimed at supporting regions and communities to accelerate their transition to climate resilience by 2030. It provides [funding opportunities](#) (it appears for any type of legal entity) for a range of initiatives.

EXTERNAL RELATIONS / INTERNATIONAL

External Relations || The EU and Norway [agreed](#) to strengthen energy cooperation and the EU also issued a joint [statement](#) with Egypt. The EU, US and others launched the [Global Methane Pledge Energy Pathway](#) to tackle methane emissions reductions in the oil and gas sector, by encouraging countries to capture maximum potential of cost-effective methane mitigation in the oil & gas sectors and eliminating routine flaring as soon as possible. This is an initiative linked to the Global Methane Pledge target, launched at COP26.

COP27 || Preparations are underway for [COP 27](#) in November 2022, including through [negotiations](#) conducted at the UNFCCC [Bonn Climate Change Conference](#).

Trade || The Commission published a [Communication](#) on its approach to trade agreements to promote green and sustainable arrangements.

Energy Charter Treaty || The Energy Charter Treaty provides a multilateral framework for energy cooperation under international law. The Commission published a [proposal for a Council Decision](#) on the position to be taken at the Extraordinary Conference of Treaty in June. This is concerned with withdrawing the observer status of Russia and Belarus.

DOMESTIC DEVELOPMENTS

Interconnection Policy || The Government is [consulting](#) on an updated National Policy Statement on Electricity Interconnection. It invites views on the extent to which commitment by Government to deliver further interconnection would impact achievement of Ireland's energy objectives; what minimum targets for future interconnection should be; whether priority should be given to interconnection with GB or the IEM; the primary benefits of interconnection; what interconnection-related amendments are required to the Electricity Regulation Act 1999; trading arrangements with GB; whether CRU's technical criteria for assessing interconnector development applications are appropriate; and which of the current three regulatory models is best for future development (merchant, fully regulated, or cap and floor). || **Closing date: 10 August 2022**.

ORESS 1 || The auction [timetable](#) was published indicating the qualification application opening date will be in January 2023 and final auction results will be announced in June 2023.



Security of Supply || The Government announced [measures](#) aimed at securing electricity supplies and helping to mitigate rising household electricity bills. They include:

- capping RESS 2 volumes in order to lower the price (although we could not see any change in projects included in the RESS 2 provisional and final auction results),
- approval of funding for second tranche of back-up generation, and
- increased borrowing limits for certain semi-state entities.

Establishment of the [Energy Security Emergency Group](#) was also announced by the Office of the Taoiseach. Funding from the Recovery and Resilience Facility was also [announced](#) by DETE (comprised of grants to help businesses form plans to de-transition from fossil fuels and for the manufacturing industry designed to encourage investment in carbon neutral heating processes, smart metering and energy monitoring, and research and development).

Climate Action Plan || The Government [reported](#) on progress. It finds a completion rate of 73%. It focuses on whether 'high impact' measures have been completed but does not seem to mention certain measures which may be of interest, such as reviewing rules on private wires.

District Heating || The Government is consulting on draft [European Union \(District Heating\) Regulations 2022](#). || **Closing date: 15 July 2022.**

Rooftop Panels || The Government [proposed](#) planning permission exemptions for rooftop solar panels on homes and other buildings. SEAI also announced home improvement [grants](#).

Mini-Generation Pilot Scheme || ESBN announced the [extension](#) of this scheme to include 250 more applicants.

Emissions Projections || The EPA published its [report](#) on GHG Emissions Projections 2021-2040. It indicates that the 'Existing Measures' scenario will not be sufficient to meet emissions reduction targets. The Minister made a brief statement [here](#).

CRU BUSINESS

Offshore Grid Connection ([CRU/2022/51](#)) || CRU is consulting on proposals for offshore grid connection policy. This follows decision [CRU/2022/14](#) that EirGrid issue Grid Connection Assessments. It proposes that grid connection and charging policy for Offshore Phase 1 is based on current onshore policy, with some differences. Further consultations will take place on asset transfer, operation and maintenance, guarantees of availability and unavailability compensation; and firm access policy. || **Closing date: 29 July 2022.**

Grid Connection ([CRU/2022/58](#)) || CRU directed EirGrid & ESBN to give grid connection offers to any applicant in the Level 1 Locational Constraint Area that is successful in the T-4 Capacity Auction for 2026/7.

Security of Supply ([CRU/2022/64](#)) || The CRU published an update on actions to increase generation capacity to provide additional stability and resilience to the system over the next four to five years. This sets out updates on systems operation and emergency planning; temporary emergency generation; retention of existing units; long term capacity provision; capacity market auctions; and policy development.

PSO ([CRU/2022/53](#)) || The CRU published the proposed decision paper on the 2022/3 PSO levy which it notes is a negative figure (-€408.52 million). It is proposing development of a mechanism to enable payments to be made to customers. || **Closing date: 12 July 2022.**

Gas Tariffs ([CRU/2022/46](#)) || The CRU has published tariffs for use of the transmission and distribution networks and decisions on multipliers, seasonal factors and discounts for the 2022/3 gas year.

Suppliers Handbook ([CRU/2022/49](#)) || The CRU published a decision on the Electricity & Gas Suppliers' Handbook. It includes changes following review of the Smart Pay-As-You-Go review of the Handbook. || CRU also reminded suppliers about required communication on identification of an issue impacting customers ([CRU/2022/54](#)).

SEMC BUSINESS

Directed Contracts ([SEM-22-029](#)) || The RAs published the Information Paper on quantities and prices for Round 19.

Capacity Market ([SEM-22-027](#)) ([SEM-22-028](#)) || The RAs have published a timetable for consultation on WG 25 modifications (1 July – 2 August 2022) and a decision on WG 23 modifications.

Generators ([SEM-22-021](#)) || The RAs published the Generator Financial Performance Report for financial year 2020. During the period, average day ahead prices were €38/MWh.

NI

The [Climate Change Act \(Northern Ireland\) 2022](#) has been passed. It commits to a target of 80% renewable electricity by 2030 and net zero carbon emissions by 2050 as compared to a baseline of 1990 or 1995 depending on the GHG concerned.



Environment & Planning

RECENT JUDGMENTS

High Court [quashes](#) SHD permission due to inadequate EIA Screening and erroneous reliance on SPPR1 as a basis for material contravention

The High Court has quashed the Board's decision to grant permission for 300 residential units at Dalguise House, Monkstown Road on three grounds. Firstly, the Court found the Board was incorrect to adopt the EIA Screening report provided by the developer as the basis for its EIA screening determination as it did not adequately identify and describe the effects of the proposed development on the environment. Secondly, the Board failed to give adequate reasons for its decision to screen out the need for EIA in relation to cultural heritage, despite the fact that the proposed development was within the curtilage of a protected structure. Finally, the Court found that it was not open to the Board to rely on SPPR1 of the Building Height Guidelines as a basis for materially contravening the Development Plan. SPPR1, on its own terms, is only capable of applying to the adoption or variation of a County Development Plan by a local authority.

High Court [grants](#) leave to appeal to the Court of Appeal on the issue of discounting costs in environmental litigation

The applicant in this case succeeded in having a planning decision of the Board quashed, but only on one of the grounds raised. On that basis, the High Court found that she had fallen significantly short of winning a majority of her points and, applying the test for discounting costs as set out in the Supreme Court's judgment in the *Connelly* case, the High Court awarded the applicant only 25% of her costs against the Board.

The applicant has now been granted leave to appeal the decision of the High Court arguing that the circumstances for discounting costs envisaged by the Supreme Court in *Connelly* should be interpreted restrictively and that the discount here was excessive.

High Court makes a further reference to the CJEU in respect of the scope of the 'not-prohibitively-expensive rule'

In January, the High Court referred six questions on the 'not-prohibitively-expensive rule' to the CJEU in the [Enniskerry](#) case. In April, a further three questions were referred in the [Save Roscam](#) case.

The Court has now decided to refer a seventh question to the CJEU in the [Enniskerry](#) case:

"Whether article 4(3) TEU, article 267 TFEU or the general principles of EU law including the principle of supremacy have the effect that the courts of a member state are obliged to disapply any rule or practice of the domestic law of the member state such as the principle of stare decisis that would have the effect of preventing, discouraging or inhibiting a court from referring a question that it is otherwise minded to refer to the CJEU or rendering that inappropriate on the ground that to do so could in effect question a previous and otherwise binding decision of another court in that member state, in particular a court of higher hierarchical standing than the referring court, or that would have the effect of preventing, discouraging or inhibiting the referring court, insofar as it may be minded to suggest possible answers to the questions being referred, from proposing an answer that it is otherwise minded to propose to the CJEU or rendering that inappropriate on the ground that to do so could in effect question a previous and otherwise binding decision of another court in that member state, in particular a court of higher hierarchical standing than the referring court."

Leave to appeal granted in respect of a number of decisions relating to the special costs rules in environmental litigation

The Supreme Court has granted leave to 'leap-frog' appeal the decisions of the High Court in the [Protect East Meath](#) and [Enniskerry](#) cases on the applicability of the special

costs rules under the Environmental (Miscellaneous Provisions) Act 2011. The Applicants argue that the test set out in the High Court judgment as to whether the special cost rules should apply has no statutory basis and involves a more restrictive costs protection regime than is envisaged under the Aarhus Convention. Notably, the Supreme Court said it would reserve its decision on the extent to which it is possible to progress the appeal, in the light of the pending CJEU reference in *Enniskerry*.

In October 2021 the Court of Appeal overturned the earlier decision of the High Court in [Heather Hill](#) and found that the special costs regime available under section 50B of the Planning and Development Act 2000 for cases dealing with issues of national environmental law would only apply to issues and grounds of challenge that relate to environmental matters and not to other grounds. The Supreme Court has now granted the applicants [leave to appeal](#) this decision, which they argue unduly restricts access to justice and breaches EU law obligations of sincere cooperation.

The applicants in *Save Roscam* and *Abbey Park* have also been granted [leave to appeal](#) the High Court's decisions that they are not entitled to costs protection under s. 50B of the Planning and Development Act 2000 or the Environment (Miscellaneous Provisions) Act 2011 to the Court of Appeal. In granting leave, the High Court noted that the question of costs in environmental litigation is coming to a head in the Supreme Court, as leave has been granted to appeal a number of decisions on the issue. For that reason, the High Court suggested that the parties might give the Supreme Court the option of accepting these appeals directly, especially as they relate directly to the *Enniskerry* issues.



DECISIONS OF THE COMMISSIONER FOR ENVIRONMENTAL INFORMATION

The **Office of the Commissioner For Environmental Information** [annulled](#) Meath County Council's decision to give access to planning documents other than in the form and manner requested by the applicant under article 7(3)(a)(i) of the AIE Regulations. The applicant sought access to electronic copies of planning documents in a format other than was publically available on the ePlanning portal. The Commissioner noted that at the time of the decision the documents had been withdrawn and were no longer available to the public in any format. The Commissioner therefore found that article 7(3)(a)(i) did not apply as the information sought must be both already available to the public and easily accessible and directed the Council to conduct a new decision-making process in respect of the appellant's request.

The **Office of the Commissioner For Environmental Information** [found](#) that article 8(a)(iv) of the AIE Regulations did not provide grounds for refusal of an electronic copy of the recording of an oral hearing held by An Bord Pleanála in relation to its decision on the SHD at Corballis East, Donabate, Co Dublin. The Commissioner found that a public hearing could not be classed as confidential and the final stages of the Board's decision-making process could not be classed as proceedings, and directed release of that information to the appellant.

LEGISLATION

The [Planning and Development \(Ministerial Guidelines\) Bill 2022](#) is currently before Dáil Éireann, Second Stage. The Bill provides for the amendment of section 28 of the Planning and Development Act 2000 in relation to ministerial guidelines and to provide for related matters.

The [Planning and Development \(Amendment\) \(No. 2\) Bill 2022](#) is currently before Seanad Éireann, Fourth Stage. The Bill amends the Planning and Development

Act 2000 to provide for applications to be made to An Bord Pleanála in respect of development of lands where an application for substitute consent of development of those lands has been made, or in respect of development of lands adjoining those lands; to remove the requirement to apply for leave for substitute consent under Part XA of that Act; and to provide for related matters.

DOMESTIC REPORTS, CONSULTATIONS AND DECISIONS

The **Environmental Protection Agency** has published an updated assessment of [Ireland's Greenhouse Gas Emissions Projections 2021-2040](#), looking at the progress of national ambitions under the Climate Action and Low Carbon Development (Amendment) Act 2021 and EU emission reduction targets for 2030 as set out under the Effort Sharing Regulation.

The **Environmental Protection Agency** has published a [factsheet](#) outlining how water quality is assessed. The EPA classifies ground water and surface water into five quality classes every three years using the approach set out in the WFD.

The **Department of Housing, Local Government and Heritage** has [published](#) the National Marine Planning Framework (NMPF) consultation report, which documents the process of consultation undertaken on the draft NMPF and the level of stakeholder participation that took place, and presents the output of the consultation process.

The **Department of the Environment, Climate and Communications** has launched a [public consultation process](#) on the Review of the National Adaptation Framework, with a focus on developing a 'climate resilient Ireland'.

Employment



EQUALITY ACT 1998 (SECTION 20A) (GENDER PAY GAP INFORMATION) REGULATIONS 2022

The Government has published the long awaited regulations to give effect to the reporting requirements under the Gender Pay Gap Information Act 2021. Both the Act and the Regulations came into effect on 31 May 2022. The Regulations require organisations with over 250 employees to publish information relating to the pay of their employees in order to show any disparity in pay between male and female employees and, if so, the level of such disparity.

Employers captured by the Regulations must choose a "snapshot date" in June 2022, and compile and publish gender pay gap data based on the state of affairs in the organisation for the 12 months prior to and including the snapshot date. This information must be published in December 2022. The Regulations also specify the information to be published, which must include (among other things) the difference between the mean and median hourly remuneration of male and female employees expressed as a percentage of the mean and median remuneration of male employees; the percentage of all male employees who were paid bonus remuneration and the percentage of female employees paid bonus remuneration; and the percentage of male and female employees who fall within each of the lower remuneration quartile, the lower middle remuneration quartile, the upper middle remuneration quartile and upper remuneration quartile pay bands.

The information must be published not later than six months from the chosen snapshot date. Where the data show differences in remuneration as between male and female employees, the employer must publish a written statement setting out the reasons for the difference, in their opinion, and any measures or proposed measures being taken to reduce or eliminate the differences. All of the information must be made available in a publicly accessible manner to both employees and the general public. The Regulations also provide detailed information on how to determine hourly remuneration, bonus remuneration and working hours of employees.

Read our full briefing on the Regulations [here](#). Our briefings on the Government guidance and FAQ documents on gender pay gap reporting are available [here](#) and [here](#).

COURT OF APPEAL ISSUES KEY DATA PROTECTION DECISION ON USE OF CCTV FOOTAGE IN THE WORKPLACE

In *Data Protection Commissioner v Doolin* [2022] IECA 117, the Court of Appeal has issued an important judgment on employer obligations under the Data Protection Act 2018 and the use of CCTV in the workplace. In particular, it found that the use of the footage in a disciplinary process was unlawful as the employer's CCTV policy confirmed that such footage was only to be used for security purposes. The Court held that the employee could not have expected the footage would be used for other purposes and as such, the employer had failed to properly notify the employee as to the purposes of data processing as per the requirements of the Data Protection Act. In so ruling, the Court of Appeal upheld a previous decision of the High Court, who had set aside the Data Protection Commission's ("the DPC") original conclusion.

The case arose from a workplace investigation into some threatening graffiti found in the employer's staffroom. Whilst investigating the graffiti, the employer noticed that an employee was taking long unsanctioned breaks, and initiated disciplinary proceedings against him. Contrary to the DPC's conclusion, the Court of Appeal found that the use of the CCTV footage as part of the disciplinary process for unsanctioned breaks could be broken down into three separate instances of processing: when the footage was recorded; when the footage was accessed by investigators; and when data concerning the dates and times of breaks was reproduced in the final disciplinary report. In addition, the Court of Appeal found that the use of CCTV to identify the person who had vandalised the staffroom was "entirely irrelevant to the incidental observation of" the complainant "taking unauthorised breaks". Under the Act, data is not processed fairly unless the data subject is notified of the purpose for processing before the processing occurs. The employee had not been notified that CCTV footage could be used to investigate disciplinary matters, and there was no

evidence that his long breaks were themselves security issues. Therefore the data was used for a purpose other than that specified to the employee, and the use of the footage in the disciplinary process was unlawful.

The full judgment can be read [here](#). Read our briefing on the High Court decision [here](#).

IMPORTANT GUIDANCE ON EMPLOYEE RELATIONSHIP

The Court of Appeal has handed down a detailed decision on the employment vs contractor relationship. In *Karshan (Midlands Limited) t/a Domino's Pizza v The Revenue Commissioners* [2022] IECA 124, the Court of Appeal set aside an earlier High Court decision and found that pizza delivery drivers were not employees, but were in fact contractors.

The case turned on the issue of mutuality of obligation, or the requirement that there must be mutual obligations on the employer to provide work for the employee and on the employee to do work for the employer. The Court engaged in a thorough examination of the contracts between the drivers and Domino's ("the Company"). In particular, they noted that the drivers were characterised as independent contractors throughout, and whilst this was not determinative of contractor status it could not be ignored. More significantly, the Court found that various provisions in the contract (including that the Company would not warrant a minimum number of deliveries and could choose not to avail of the drivers; that the Company accepted the right of the Contractor to carry out other work; that drivers could send a substitute where they became unavailable and that the Contractor could invoice the Company and make themselves unavailable for work) all "demonstrate an intent to create an ongoing relationship which is not intended to have mutuality of obligation". As a result, the drivers were not employees but in fact, self-employed contractors.

The Court published three separate judgments, accessible [here](#), [here](#) and [here](#).



Public Procurement

NEW EU LEGISLATION ON INTERNATIONAL PROCUREMENT

International Procurement Instrument

Both the Council and Parliament have adopted the [Regulation](#) on access of third-country goods and services to the Union's internal markets in public procurement and procedures supporting negotiations on access of Union goods and services to the public procurement markets of third countries (otherwise known as the International Procurement Instrument). See [here](#) for the Council's press release and [here](#) for the Parliament's press release. The Regulation will now be published in the Official Journal of the EU and enter into force on the 60th day following its publication. The main elements are as follows.

- It introduces measures limiting non-EU companies' access to the open EU public procurement market if their governments do not offer similar access to public tenders to EU companies seeking business.
- The aim of the new tool is to "encourage the reciprocal opening of protected markets to EU economic operators".
- This means that if the Commission finds that European companies face serious and recurring restrictions on access to public procurement in third countries AND if, following consultation with the third country concerned those barriers persist, it may impose measures limiting the access of that third country's companies to European public procurement and concession markets in response.

Distortions caused by Foreign Subsidies

The Council agreed its [position](#) on the Commission's proposal for a [Regulation](#) to address distortions caused by foreign subsidies in the Single Market. It would give the Commission the power to investigate financial contributions granted by public authorities of a non-EU country which benefit companies engaging in an economic

activity in the EU and to redress their distortive effects. The Regulation proposes the introduction of three tools:

- a notification-based tool to investigate *bids in public procurements* involving a financial contribution by a non-EU government, where the estimated value of the procurement is €250 million or more;
- a notification-based tool to investigate *concentrations* involving a financial contribution by a non-EU government, where the EU turnover of the company to be acquired (or of at least one of the merging parties) is €500 million or more and the foreign financial contribution is at least €50 million; and
- a tool to investigate *all other market situations* and smaller concentrations and public procurement procedures, which the Commission can start on its own initiative (ex-officio) and may request *ad-hoc* notifications.

The Council can now start negotiations with the European Parliament as soon as the Parliament has agreed its position.

FIFTH PACKAGE OF SANCTIONS AGAINST RUSSIA BY THE EU

The EU's [fifth package](#) of restrictive measures against Russia (implemented in [EU Regulation 2022/576](#)) includes restrictions relating to public procurement. The Regulation inserts Article 5k into EU sanction law. Article 5k prohibits the award or continuation of the execution of any public or concession contract falling within the scope of the public procurement Directives to or with:

- a Russian national, or a natural or legal person, entity or body established in Russia;
- a legal person, entity or body whose proprietary rights are directly or indirectly owned for more than 50% by an entity referred to in (a); or

- a natural or legal person, entity or body acting on behalf or at the direction of an entity referred to in (a) or (b),

including where any of these account for more than 10% of the contract value, subcontractors, suppliers or entities whose capacities are being relied on within the meaning of the public procurement Directives.

The Office of Government Procurement published information on this [here](#).

SUSTAINABLE PROCUREMENT

The Council published draft [conclusions](#) on the Development of Sustainable Public Procurement which:

- call on the Commission to consider, in line with its commitment in the [Sustainable Europe Investment Plan](#) and in the [Circular Economy Action Plan](#), the possibility of introducing sustainable development considerations into public procurement procedures for sectoral goods or services,
- underline that, depending on the sector, these considerations may range from [sustainable development goals](#), professional abilities or technical specifications related to sustainable development in contracts, to sustainability criteria, in particular for the execution or the awarding of contracts,
- urge the Commission and Member States to work together to map, in relation to public procurement, the sectors relevant in terms of their sensitivity to sustainable development considerations and to assess their maturity, and
- consider that the Commission and the Member States should therefore consider a general framework, intended to introduce the taking into account of sustainable and resilient development considerations into public procurement, irrespective of the sector concerned.



EU CASE LAW

Co-operation between Public Authorities: Sambre & Biesme and Commune de Farciennes -v- Société Wallonne du Logement (Joined Cases C-383/21 and C-384/21 - Advocate General Opinion)

In Belgium, a public housing developer and a municipality decided to conclude a framework procurement agreement. Under that agreement, a contract for technical assistance in connection with the building of housing and a contract for asbestos surveying services were to be granted not by competitive tendering but by direct award to a third party, which was also a public entity. However, the authority commissioned by the Walloon Government to supervise the performance of public housing undertakings cancelled the agreement on the ground that the conditions for a direct contract award were not met. The two signatories of the agreement challenged the decision to cancel the agreement on the ground that, in their view, the direct award was compatible with [Directive 2014/24](#).

The Belgian Court referred preliminary questions connected with the fact that Directive 2014/24 had not yet been transposed in Belgian law when the events took place, even though the time limit for transposition of the Directive had expired, and application of Article 12 of [Directive 2014/24](#), which regulates public contracts between entities within the public sector. In particular, Article 12(4) sets out circumstances in which a contract concluded exclusively between two or more contracting authorities will not be in the scope of the Directive. The AG opined that:

- A contracting authority which wishes to award a public contract falling within the scope of Directive 2014/24/EU without being subject to the award procedures laid down in that directive must fulfil the conditions set out in Article 12 as from the deadline for transposing that directive into national law, if it has not been so transposed by that date.

- Article 12(4) of Directive 2014/24 must be interpreted as meaning that:
 - o it precludes the existence of cooperation between contracting authorities where the relationship which exists between them, and in the context of which they undertake to provide their respective services, does not pursue objectives common to all of them, and
 - o it does not cover a relationship between independent contracting authorities under which one obtains from the other a service in return exclusively for payment in money.

IRELAND

Word Perfect Translation Services Limited –v- The Minister for Public Expenditure and Reform (Court of Appeal Judgment [\[2022\] IECA 131](#))

Earlier in the year we mentioned the judgment with citation [\[2022\] IEHC 54](#) in which the High Court decided that Word Perfect did not have standing to challenge the award of a Multi-Supplier Framework Agreement for the provision of Irish Language Translation Services, on the basis that it had not submitted a tender. Word Perfect appealed this decision.

The Court of Appeal has now dismissed Word Perfect's appeal in [\[2022\] IECA 131](#), upholding the decision of the High Court.

Following lengthy analysis the Court considered that in order to be an "eligible person" within the meaning of Regulation 4 (Persons to whom review procedures are available) of the [Remedies Regulations](#) in the sense of having an "interest in obtaining" the contract at issue in the public procurement tender procedure, the applicant must have participated in the particular tender procedure by submitting a tender.

The Court noted that this general principle or rule is subject to exceptions, the categories of which are not closed, but which include where it was not possible for the applicant to put in a tender for various reasons, including where the tender procedure was not properly advertised and where, by reason of alleged discriminatory specifications or otherwise, it would have been impossible for the applicant to succeed in the tender procedure.

The Court of Appeal noted that in considering whether Word Perfect had an "interest" in obtaining the relevant contract and whether it was allegedly harmed or likely to be harmed as a result of alleged public procurement breaches, the High Court judge correctly identified *Grossmann* and its Irish equivalent, *Copymoore (No. 1)*, as well as the CJEU case of *Amt* as being the most significant cases in terms of the correct interpretation of Article 1(3) of the [Remedies Directive](#) and Regulation 4 of the Remedies Regulations.



Real Estate

REAL ESTATE LITIGATION

Vacation of Lis Pendens on the Grounds of Unreasonable Delay

In *Ellis v Boley View Owners Management Co Ltd* [2022] IEHC 103, the owners' management company of a housing development sought vacation of a *lis pendens*, which had been registered against its interest in the development by a person who had issued proceedings against the original landowner who owned the site for the development. Vacation was sought under both limbs of [Section 123\(b\)\(ii\) of the Land and Conveyancing Law Reform Act 2009](#), i.e. 'unreasonable delay in prosecuting the action' and 'the action not being prosecuted *bona fide*'. The High Court granted the application to vacate the *lis pendens*, on the grounds that the plaintiff's delay in prosecuting the proceedings was unreasonable.

A *lis pendens* (the Latin term for 'litigation pending') is a burden that can be registered against land in circumstances where there is ongoing litigation over a property that could ultimately reduce its value or affect the interest of its registered owner.

REAL ESTATE LEGISLATION

Planning Exemptions for Solar Panels

The Government has proposed planning permission exemptions for rooftop solar panels on homes and other buildings. Read more [here](#).

Derelict Sites

The [Derelict Sites Act 1990 \(Urban Areas\) Regulations 2022](#) prescribe certain areas in the cities/counties of Cork City, County Galway, County Offaly, County Clare, County Meath, County Cavan and County Westmeath to be urban areas for the purposes of the [Derelict Sites Act, 1990](#). This enables local authorities to determine the market value of such lands for the purpose of imposing the derelict sites levy.

REAL ESTATE REGULATORY REFORM

Justice Plan 2022

[Justice Plan 2022](#) is the second of a series of annual plans to drive reforms across the Justice sector. Under Goal 2 (*Improve access to justice and modernise the courts system*), the plan lists the progression and implementation of the following 'Housing for All' actions:

- regulate under [Section 18\(17\) of the Multi-Unit Developments Act 2011](#) to ensure that Owner Management Companies (OMCs) are financially sustainable;
- regulate under [Section 19\(9\) of the MUD Act](#) to ensure that OMCs provide for expenditure of a non-recurring nature (i.e. sinking fund expenditure), and examine the introduction of a non-statutory dispute resolution process;
- examine measures to accelerate conveyancing as part of the sale and land transfer process;
- examine the potential extension of the role of estate agents to include an initial inspection of rental property to the extent possible; and
- establish a new Division of the High Court dealing with planning and environmental issues.



State Aid

COMMISSION APPROVES PROLONGATION OF FINANCING DEADLINE UNDER EUROPEAN GUARANTEE FUND

The European Commission has approved a prolongation of the deadline for banks to provide new financing to companies under the European Guarantee Fund (the “Fund”). The Fund brings together the support of twenty-two Member States under the management of the European Investment Bank Group. The Fund aims to address the financing needs of European companies, mainly small and medium-sized enterprises, affected by the COVID-19 pandemic by providing guarantees on debt instruments and equity instruments. The deadline for banks to provide new financing to companies has been extended from 30 June 2022 to 31 December 2022. This extension will allow banks to include loans and other financing options under the Fund’s guarantee. The Commission assessed the extension under EU State Aid rules, in particular Article 107(3)(b) TFEU, which allows aid to be granted by Member States to remedy a serious disturbance in their economy. The Commission determined that the prolongation is appropriate to allow banks to address the financing needs of European companies. The Commission concluded that the prolongation does not affect the compatibility of the Fund’s measures with the internal market. On this basis, the Commission approved the prolongation under EU State Aid rules. See the full press release [here](#).

COMMISSION SEEKS FEEDBACK ON UPDATES TO DE MINIMIS REGULATION, SETTING EXEMPTIONS FROM NOTIFICATION FOR SMALL AMOUNTS OF AID

The European Commission launched a Call for Evidence inviting all interested parties to give feedback on the proposed review of the de minimis Regulation. Under the current rules, Member States can grant support of up to €200,000 per beneficiary over a period of three years (‘de minimis threshold’) without prior notification to the Commission. This amount is not regarded as having an impact on competition and trade in the EU Single Market, and thus is not considered to be State Aid. The current rules are set to expire on 31 December 2023. The

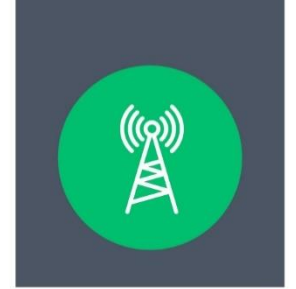
proposed changes would update the current threshold, taking into account past and estimated inflation for the 2014-2030 period and reflecting recent economic developments. In addition, in line with the outcome of the 2019 State Aid fitness check, the Commission wants to introduce a mandatory register of beneficiaries, with the objective of strengthening transparency for stakeholders and Member States while reducing the administrative burden for companies who currently operate a self-declaration system. The consultation is open until 25 July 2022 and the Commission will take into account the feedback received in its revision of the de minimis State Aid rules. See the full press release [here](#).

COMMISSION APPROVES SPANISH AND PORTUGUESE MEASURE TO LOWER ELECTRICITY PRICES AMID ENERGY CRISIS

The European Commission has approved a €8.4 billion Spanish and Portuguese measure aimed at reducing the wholesale electricity prices in the Iberian market (MIBEL) by lowering input costs of fossil fuel-fired power stations. The measure was approved under Article 107(3)(b) TFEU, recognising that the Spanish and Portuguese economies are experiencing a serious disturbance. The measure will last until 31 May 2023. The measure will take the form of a payment that operates as a direct grant to electricity producers aimed at financing part of their fuel cost. The daily payment will be calculated based on the price difference between the market price of natural gas and a gas price cap set at an average of €48.8/MWh during the duration of the measure. The Commission assessed the measure under EU state aid rules and concluded that the measure is appropriate, necessary and proportionate, in line with Article 107(3)(b) TFEU. In particular, the Commission found that the measure keeps competition distortions to a minimum and avoids negative impacts on the functioning of spot and forward electricity markets. In addition, the measure does not lead to any cross-border restrictions to trade or discrimination between Iberian and non-Iberian consumers. See the full press release [here](#).

COMMISSION APPROVES €160 MILLION PORTUGUESE SCHEME TO SUPPORT GAS INTENSIVE COMPANIES IN CONTEXT OF RUSSIA’S INVASION OF UKRAINE

The European Commission has approved a €160 million Portuguese scheme to support gas intensive companies in the context of Russia’s invasion of Ukraine. The measure was approved under the State Aid Temporary Crisis Framework, based on Article 107(3)(b) TFEU, recognising that the EU economy is experiencing a serious disturbance. Under this measure, beneficiaries will receive limited amounts of aid in the form of direct grant. The scheme will be open to companies operating in the manufacturing industry that are particularly reliant on gas for their daily operation and are affected by the high energy prices caused by the current geopolitical crisis. The Commission found that the Portuguese measure is in line with the conditions set out in the Temporary Crisis Framework. In particular, the aid: (i) will not exceed €400,000 per beneficiary, and (ii) will be granted no later than 31 December 2022. The Commission concluded that the measure is necessary, appropriate and proportionate to remedy a serious disturbance in the economy of a Member State, in line with Article 107(3)(b) TFEU and the conditions set out in the Temporary Crisis Framework. See the full press release [here](#).



Telecoms

COMREG RELEASES KEY DATA REPORT ON THE ELECTRONIC COMMUNICATIONS MARKET FOR Q1 2022

On 9 June 2022, ComReg released its Quarterly Key Data Report on the electronic communications market for the first quarter of 2022. The data revealed a 0.8% increase in the number of fixed broadband subscriber lines to 1.59 million, of which approximately 402,000 were fibre-to-the-premises ("FTTP") lines. FTTP lines now make up just over a quarter (25.3%) of the total fixed broadband subscriber lines in the State. Perhaps reflecting a change in consumers' behaviour, the average fixed broadband subscriber line used 8.5% less data in the first three months of 2022 compared to the first quarter of 2021, when heavy restrictions in relation to COVID-19 pandemic were in place. The full Quarterly Key Data Report for Q1 2022 is available [here](#).

COMREG NETWORK OPERATIONS UNIT PUBLISHES ANNUAL REPORT 2021

ComReg's Network Operations Unit ("NOU") is a specialised team within ComReg which is focussed on technical network issues. Its annual report covers network resilience and reviews incidents on the network in 2021. The report also details the work of the Nuisance Communications Industry Taskforce, which seeks to bring representatives of the electronic communications industry together to combat nuisance communications. Nuisance communications are unwanted, unsolicited communications generally directed at large groups of the population. The annual report is available [here](#).